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25 Plaintiffs' Co-Lead Class Counsel

26 **UNITED STATES DISTRICT COURT**

27 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

28 AARON SENNE, et al., Individually and on
Behalf of All Those Similarly Situated;

CASE NO. 3:14-cv-00608-JCS (consolidated
with 3:14-cv-03289-JCS)

Plaintiffs,

CLASS ACTION

vs.
29 OFFICE OF THE COMMISSIONER OF
30 BASEBALL, an unincorporated association
31 doing business as MAJOR LEAGUE
32 BASEBALL; et al.;
33 Defendants.

**NOTICE OF MOTION AND MOTION TO
INTERVENE; MEMORANDUM IN SUPPORT**

Hearing date: May 28, 2021
Hearing Time: 9:30 a.m.
Courtroom: F, 15th Floor
Judge: Honorable Joseph C. Spero

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NOTICE OF MOTION AND MOTION

Please take notice that Bryan Henry will and hereby does move to intervene in this case. Mr. Henry asks that this motion be heard on May 28, 2021 at 9:30 a.m., or at the earliest date that the Court deems this motion suitable for resolution with or without oral argument at the Court's discretion, (L.R. 7-1(b)), in Courtroom F, 15th Floor of the U.S. District Court for the Northern District of California, San Francisco Division, before the Honorable Joseph C. Spero.

This motion is made pursuant to Federal Rule of Civil Procedure 24. Mr. Henry has a right to intervene since he meets the requirements of Rule 24(a); alternatively, he asks the Court to permissively allow him to intervene under Rule 24(b). This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the accompanying Complaint in Intervention, the records on file in this action, and upon additional evidence and argument as may be presented at or before the hearing on this Motion.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Bryan Henry, a former minor league baseball player, seeks to intervene to replace Roberto
 3 Ortiz as a class representative in the case. Mr. Ortiz is currently the only class representative who
 4 worked in the minors for the Arizona Diamondbacks, and class counsel will soon seek to withdraw
 5 him as a class representative. Mr. Henry also worked in the minor leagues for the Diamondbacks. He
 6 previously opted into the case's FLSA Collective in March 2015. *See* Doc. 366. To ensure that Mr.
 7 Ortiz's withdrawal as a class representative does not create any potential issues related to standing, Mr.
 8 Henry seeks to replace him.

9 It is not uncommon for class representatives to be replaced during the course of lengthy
 10 litigation. Nearly four years passed while the case was on appeal, and the possible need to replace Mr.
 11 Ortiz with Mr. Henry only recently became known. With the appeal over, and with trial still 16
 12 months away, now is an appropriate time for Mr. Henry to be substituted for him.

13 Before filing this Motion, Plaintiffs conferred with Defendants. Defendants indicated that
 14 they did not anticipate opposing this Motion so long as Plaintiffs agreed that Defendants are entitled
 15 to seek deposition time and written discovery from Mr. Henry. Plaintiffs agreed that Defendants are
 16 entitled to depose Mr. Henry and are entitled to written discovery from him that is similar in scope to
 17 the written discovery agreed to be provided by the named Plaintiffs. Broshuis Decl., ¶ 3. Thus, it is
 18 anticipated that this motion will go unopposed.

19 Moreover, Mr. Henry has a right to intervene under Rule 24. He has moved in a timely
 20 fashion upon learning of the upcoming withdrawal of Mr. Ortiz as a class representative; has legal
 21 interests that may be impaired by the proceedings; and brings forth interests that may not be
 22 adequately represented by current class representatives. Under these circumstances, he must be
 23 permitted to intervene under Rule 24(a). If the Court determines that he does not have an absolute
 24 right to intervene, however, then Mr. Henry respectfully asks that the Court exercise its discretion to
 25 allow him to permissively intervene under Rule 24(b).

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ARGUMENT

2 “[T]he weight of existing authority indicates a motion to intervene is the proper procedure to
3 follow for a class member who wishes to join a lawsuit as a representative plaintiff.” *Munoz v. PHH*
4 *Corp.*, No. 1:08-CV-0759-AWI-BAM, 2013 WL 3935054, at *5 (E.D. Cal. July 29, 2013). Intervention
5 can be permitted as a matter of right under Rule 24(a) or permissively permitted pursuant to the
6 Court’s discretion under Rule 24(b). As detailed below, the intervenors satisfy the requirements for
7 both forms of intervention, so their motion should be granted.

I. Mr. Henry has the right to intervene under Rule 24(a).

In its March 2017 Order that previously allowed certain players to intervene, the Court relied on permissive intervention under Rule 24(b) without reaching intervention as a matter of right. Doc. 782. The Court did so again when recently granting a second motion to intervene. Doc. 862. If the Court takes the same approach for this motion, there would again be no need for the Court to perform the Rule 24(a) analysis. Yet Mr. Henry respectfully believes that he does have the right to intervene, so Rule 24(a) will be analyzed here.

15 Rule 24(a) states that, on a “timely motion, the court must permit anyone to intervene” who
16 “claims an interest relating to the property or transaction that is the subject of the action, and is so
17 situated that disposing of the action may as a practical matter impair or impede the movant’s ability to
18 protect its interest, unless existing parties adequately represent that interest.” Courts should “construe
19 Rule 24(a) liberally in favor of potential intervenors,” and should be guided by practicalities—not
20 technicalities. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). As articulated in
21 *Berg*, the Ninth Circuit uses a four-part test to evaluate motions under Rule 24(a):

(1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must not be adequately represented by the existing parties in the lawsuit.

25 | *Id.* Mr. Henry meets all four requirements.

1 **Timeliness.** The first requirement is that the motion be timely. “Timeliness is a flexible
2 concept,” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004), but courts are guided by
3 three considerations: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the
4 reason for and length of the delay. *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984). “Mere
5 lapse of time alone is not determinative.” *Id.* In motions to intervene by putative class members in a
6 class action, timeliness is measured in relation to when the proposed intervenors became aware that
7 their interests “would no longer be protected by the named class representatives.” *Hill v. W. Elec. Co.*,
8 672 F.2d 381, 386 (4th Cir. 1982).

9 It is appropriate at this stage of the proceedings for Mr. Henry to intervene. During the
10 pendency of the appeal, and until it was determined that Mr. Ortiz would be withdrawn as a class
11 representative, there was no need for Mr. Henry to seek to intervene because his interests were
12 already adequately represented by current class representatives. With the withdrawal of Mr. Ortiz, that
13 has possibly changed, and Mr. Henry is promptly seeking to intervene.

14 Not only has there been no delay, but there is no prejudice to Defendants—which is the
15 “most important consideration” of timeliness. *State of Or.*, 745 F.2d at 552. Prejudice is measured by
16 the “harm that arises from late intervention as opposed to early intervention.” *Munoz*, 2013 WL
17 3935054, at *8. No new legal theories are being presented, so the scope of the case will not change.
18 *See Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV.S-05-629 LKK/GGH, 2006 WL
19 1455430, at *3 (E.D. Cal. May 24, 2006) (no prejudice results when intervenors “make the same
20 fundamental arguments”). Any further discovery burdens will be minimal. The parties have agreed
21 that Defendants are entitled to discovery from him that is similar in scope to the discovery agreed to
22 be provided by the named Plaintiffs, but given the case management order recently entered, there is
23 time for this to take place. *See* Doc. 842.

24 And in the absence of intervention, Mr. Henry would be permitted to file his own separate
25 suit, which would lead to the need for further discovery anyway. It is far more efficient for this
26 discovery to fold into the existing progress already achieved in this case. *See Kamakahi v. Am. Soc’y for*
27 *Reprod. Med.*, No. 11-CV-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015) (Spero, J.)

1 (“The actual work that will need to be done as a result of intervention is almost entirely the same
 2 work that would have been required if Proposed Intervenors had intervened earlier, or even if they
 3 had been parties from the outset: Defendants will need to take Proposed Intervenors’ depositions and
 4 perhaps conduct other discovery limited to their personal capacity to serve as Rule 23(b)(2) subclass
 5 representatives.”).

6 ***Significantly protectable interest.*** The intervenor must also have a significantly protectable
 7 interest in the action. This is a “practical, threshold inquiry,” and “[n]o specific legal or equitable
 8 interest” is needed. *Berg*, 268 F.3d at 818. The requirement is generally satisfied when the asserted
 9 interest is “protectable under some law” and the claims at issue relate to that interest. *Id.*

10 A class member has a significantly protectable interest in a class action. *Glass v. UBS Fin. Servs., Inc.*,
 11 No. C-06-4068 MMC, 2007 WL 474936, at *2 (N.D. Cal. Jan. 17, 2007), *aff’d*, 331 F. App’x 452
 12 (9th Cir. 2009) (“As [intervenor] is a member of the *Glass* class, he has a significant protectable
 13 interest relating to the subject of the instant action.”); *Koike v. Starbucks Corp.*, 602 F. Supp. 2d 1158,
 14 1161 (N.D. Cal. 2009) (“Because FRCP 23 provides Nguyen with a procedure for pursuing his claims,
 15 the court finds Nguyen’s interest in the procedural vehicle of a class action to be significantly
 16 protectible.”). As the Third Circuit has stated,

17 In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry
 18 are satisfied by the very nature of Rule 23 representative litigation. Therefore, when
 19 absent class members seek intervention as a matter of right, the gravamen of a court’s
 analysis must be on the timeliness of the motion to intervene and on the adequacy of
 representation.

20 *In re Cnty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005).

21 Although the Ninth Circuit in *Berg* made clear that a specific *legal* interest is not required, there
 22 are specific legal interests here: the case implicates Mr. Henry’s statutorily protected rights because his
 23 claims overlap with the claims at issue in the case. See *Munoz*, 2013 WL 3935054, at *11-12 (absent
 24 class members’ RESPA claims that overlapped with the class claims provided a significant protectable
 25 interest). Thus, there are significantly protectable interests that directly relate to the case’s core claims.

26 ***Possible impairment of that interest.*** “If an absentee would be substantially affected in a
 27 practical sense by the determination made in an action, he should, as a general rule, be entitled to

1 intervene.” *Berg*, 268 F.3d at 822. It is enough that the interests *may* be affected—absolute certainty is
 2 not required. *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 900 (9th Cir. 2011).

3 The interests of Mr. Henry may be affected in multiple ways. First, there are the possible stare
 4 decisis effects on his claims. The Eleventh Circuit has found this alone to be enough to support
 5 intervention as a matter of right under similar circumstances. *Stone v. First Union Corp.*, 371 F.3d 1305,
 6 1310 (11th Cir. 2004). In *Stone*, an age discrimination case, the district court initially certified an opt-in
 7 class and later decertified it. *Id.* at 1307. Opt-ins then sought to intervene, and the Court denied the
 8 motion. *Id.* at 1308. The Eleventh Circuit reversed, holding that they had the right to intervene. The
 9 case alleged that a central policy violated age discrimination laws, so the district court’s ruling in the
 10 case would “influence later suits” and have “significant persuasive effects.” *Id.* at 1310. These effects
 11 were “sufficiently significant to warrant intervention.” *Id.*; *see also Cook v. Boorstin*, 763 F.2d 1462, 1471
 12 (D.C. Cir. 1985) (overturning denial of right to intervene to absent class members in race
 13 discrimination case after class certification denied because they had a right to intervene). The same is
 14 true for Mr. Henry here because the Court’s decisions on MLB’s uniform policies will certainly
 15 influence any later suits that might be brought.

16 Second, there are possible class action-related decisions that may substantially affect the
 17 intervenor’s interest. Again, the Third Circuit has held that these interests automatically satisfy Rule
 18 24(a). *In re Cnty. Bank of N. Virginia*, 418 F.3d at 314. Mr. Henry is seeking to intervene to replace a
 19 class representative. While Mr. Henry could file his own separate action, doing so would not just be
 20 inefficient—it would also impair his interest in proceeding as a class. And due to minor leaguers’ fear
 21 of reprisal for joining the lawsuit, along with the relatively small size of the individual claims, it may
 22 mean that the claims of many minor leaguers will never be brought. *See Munoz*, 2013 WL 3935054, at
 23 *12 (since many putative class members may not file a suit, denying intervention “will impair the
 24 interests of [the intervenor] and the class members she seeks to represent”).

25 ***Adequate representation.*** “The burden on proposed intervenors in showing inadequate
 26 representation is minimal, and would be satisfied if they could demonstrate that representation of
 27 their interests ‘may be’ inadequate.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). It is

1 relevant whether the existing plaintiffs are capable of making the intervenor's arguments, and whether
 2 the intervenor offers something that would otherwise be neglected. *Sagebrush Rebellion, Inc. v. Watt*, 713
 3 F.2d 525, 528 (9th Cir. 1983).

4 The drafters of Rule 24 intended for class members to use intervention to protect interests in
 5 class actions under these circumstances. As Rule 24's advisory comments from 1966 state, "a member
 6 of a class should have the right to intervene in a class action if he can show the inadequacy of the
 7 representation of his interest by the representative parties before the court."¹ As noted above, Mr.
 8 Ortiz (who will be withdrawn as a class representative) is currently the only class representative who
 9 played in the minors for the Arizona Diamondbacks—something that Mr. Henry has in common with
 10 Mr. Ortiz. *See* Broshuis Decl., ¶ 2. To ensure that his claims are adequately represented, Mr. Henry
 11 seeks to replace Mr. Ortiz as a class representative.

12 Since Mr. Henry meets all the requirements of intervention as a matter of right, the Court
 13 should grant the motion.

14 **II. Alternatively, Mr. Henry asks to permissively intervene under Rule 24(b).**

15 If the Court does not find Rule 24(a)'s requirements met, it should still grant permission to
 16 intervene under Rule 24(b). This was the approach previously taken by the Court in its March 2017
 17 Order, Doc. 782, and more recently when granting the second motion to intervene, Doc. 862. The
 18 same analysis would apply here. Permissive intervention has three elements: timeliness, commonality,
 19 and a basis for jurisdiction. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996).

20 This motion is timely for the reasons provided in the preceding section, in that Mr. Henry is
 21 seeking to intervene at the same time a class representative will be withdrawn. *See* Doc. 782 at 38
 22 (finding previous intervenor had timely moved to intervene after a class representative had

23
 24 ¹ The comment goes on to state: "A class member who claims that his 'representative' does not
 25 adequately represent him, and is able to establish that proposition with sufficient probability, should
 26 not be put to the risk of having a judgment entered in the action which by its terms extends to him,
 27 and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack.
 Rather he should, as a general rule, be entitled to intervene in the action." Rule 24 Advisory
 Committee Note to the 1966 Amendment.

1 withdrawn). And there will be no prejudice. As the Court previously found, the intervenors “could
 2 assert these same claims in a separate action,” the “same discovery would be necessary if the Court
 3 were to require them to file separate actions,” and there are “no imminent deadlines” that would be
 4 impacted by intervention. *Id.*

5 Also, commonalities are present because Mr. Henry has claims that “share a common
 6 question of law or fact” in the main action. *See* R. 24(b)(1)(B). Looking to the Court’s original class
 7 certification order, the commonalities include the legality of not paying any wages for work performed
 8 outside the season, of not paying overtime pay no matter how many hours worked, and of often not
 9 paying at least the minimum wage during the season. *See* Dkt. 687, at 62-63. Lastly, the Court has
 10 jurisdiction over the FLSA claims under 28 U.S.C. §§ 1331 and 1337, and supplemental jurisdiction
 11 over the state law claims under 28 U.S.C. § 1367.

12 As the Court held in its March 2017 Order, it is “in the interest of judicial efficiency” to allow
 13 Mr. Henry—with “claims based on essentially the same theories and evidence as those of the existing
 14 Named Plaintiffs”—to enter this case. *Id.* Indeed, because of the length of the appeal, the stage of
 15 proceedings has not changed significantly since the Court entered that March 2017 Order. The main
 16 things that have changed are that the Rule 23(b)(3) classes have been certified, and a class
 17 representative will be withdrawn. *See also Kamakahi*, 2015 WL 1926312, at *4 (allowing members of
 18 putative class who had standing to pursue injunctive relief to intervene after the Court denied Rule
 19 23(b)(2) class certification based on a lack of standing).

20 And to reiterate, Defendants have represented that they do not anticipate opposing this
 21 Motion so long as Plaintiffs agreed that Defendants had the right to seek supplemental discovery
 22 from Mr. Henry. Plaintiffs agreed to that, so there likely will not be opposition to Mr. Henry entering
 23 the case. Broshuis Decl., ¶ 3.

24 **III. In accordance with Rule 24(c), a complaint in intervention is included.**

25 In accordance with Rule 24(c), a proposed complaint in intervention is being filed in support
 26 of this motion. As with the previous motions to intervene, the complaint in intervention adopts the
 27 allegations in the operative complaint in the case, Dkt. 382, and it adds allegations specific to Mr.

1 Henry. Mr. Henry respectfully asks that the proposed complaint in intervention be deemed filed and
2 served as of the date of the Order granting the motion to intervene.

3 **CONCLUSION**

4 For the foregoing reasons, the Court should grant the motion to intervene pursuant to Rule
5 24 and deem the proposed complaint in intervention filed and served.

6 DATED: April 22, 2020

7 Respectfully submitted,

8 /s/ Garrett R. Broshuis

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15 *Plaintiffs Co-Lead Class Counsel*

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered for electronic filing.

/s/ Garrett R. Broshuis
Garrett R. Broshuis